SUPREME COURT, U. S.

JUL 12 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-103

DOLORES IANNELLI, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 12, 1973.

CITATIONS TO OPINIONS BELOW

The district court's opinion denying motions to suppress evidence and to dismiss the indictment is reported at 339 F. Supp. 171 and is reprinted in Appendix A, in the petition filed at No. 73-64. The opinion of the Court of Appeals is not yet reported and is reprinted in Appendix A hereto, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered June 12, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether the authorization and identification procedures followed by the Department of Justice in this case were sufficient to comply with Title III of the Omnibus Crime Control Act and Safe Streets Act of 1968 and whether the evidence obtained by wiretap should have been suppressed.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix B, infra.

STATEMENT OF THE CASE

On March 25, 1971, Dolores Iannelli and a number of other persons were indicted for conspiracy and for alleged violation of 18 U.S.C. 1955. After considerable pre-trial proceedings the case came on for trial before District Judge Joseph F. Weis, Jr., on April 4, 1972. The trial consumed aproximately twenty trial days. Judgments of acquittal were granted as to four defendants and all the remaining defendants were convicted with the exception of Dolores Iannelli. The jury being unable to agree on Dolores Iannelli, a mistrial was granted as to her.

The government determined to re-try Dolores Iannelli for conspiracy and violation of 18 U.S.C. 1955 and, accordingly, additional pre-trial proceedings were held on August 2, 1972, before Judge Weis. At that pre-trial Judge Weis ruled that all of the motions

filed in the original case and the rulings made thereon would be incorporated as a part of the second case, thus obviating the necessity for refiling duplicate motions.

Dolores Iannelli was retried November 8, 1972, before a jury and Judge Weis. The conspiracy count of the indictment was dismissed on oral motion of the government. (15A) On November 10, 1972, the jury found Dolores Iannelli guilty as to Count Two of the indictment. She was immediately sentenced to six month imprisonment which was suspended and was fined five thousand dollars. (15A)

On October 19, 1970 Senior District Judge Wallace S. Gourley, sitting in Pittsburgh, Pennsylvania, upon submission of an application and affidavit to him by John M. Elias, an attorney for the Department of Justice, authorized the interception of incoming and outgoing calls at the residence of Robert and Dolores Iannelli. (52A)* The application was purported to have been authorized by Will Wilson, Assistant Attorney General for the Criminal Division of the Department of Justice and was accompanied by a letter which purported to bear his signature. (39A, 52A)

Motions to suppress were filed as well as a motion to compel admissions. (82A, 85A, 102A) In the course of the pretrial discovery and motion procedure it was disclosed that Will Wilson did not sign the letter of authorization nor did he ever review the file. (112A) Affidavits were submitted by Sol Lindenbaum and Henry Peterson which disclosed that the letter was actually signed by Henry Peterson, an assistant to

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* These references are to the Appendix in the Court of Appeals.

Mr. Wilson. (121A) The affidavit of Mr. Lindenbaum indicated that the then Attorney General, John Mitchell, had personally authorized the application. (109A) A copy of a memorandum from Mitchell to Wilson allegedly bearing Mitchell's initials was produced with Lindenbaum's affidavit. (111A) By this memorandum Mitchell designated Will Wilson to authorize the application.

Because of the paucity of facts contained in the affidavits and the failure of the Attorney General to submit an affidavit in this case, defendants requested and were granted permission to depose Mr. Lindenbaum. Mr. Lindenbaum's deposition disclosed that he had never seen the Attorney General initial the memo and that he actually did not know who placed the initials on the memo. (407A, 411A) The district court refused to suppress on the assumption that the Attorney General had personally initialed the memo. (435A) At no time up to the present has the Justice Department offered to submit an affidavit from Mr. Mitchell.

The evidence gained by the wire interceptions was utilized at the trials and tended to show that the defendants were engaged in a large scale sports betting operation

REASONS FOR GRANTING THE WRIT

1. The question presented here with respect to the authorization and identification procedures utilized by the Department of Justice is identical to that posed by *United States* v. *Chavez,* No. 72-1319, certiorari granted May 22, 1973. The question posed here is also similar to the question posed in *United States* v.

Giordano, No. 72-1057, certiorari granted March 26, 1973.

The only factual distinctions between the instant case and *United States* v. *Chavez* are that in *Chavez* there were two taps, one personally authorized by Attorney General Mitchell and the second authorized by Sol Lindenbaum, his Executive Assistant. The first tap in *Chavez* was suppressed because of misidentification and the second was suppressed because of improper authorization. In the instant case there was only one tap in which the authorizing officer was clearly misidentified. Whether the application in this case was authorized personally by the Attorney General is not known, in point of fact, the record does not disclose who authorized it. Thus the interesting question is raised as to whether mere assumptions may be substituted for proof. In this respect the present case is factually similar to the case of *Fiorella* v. *United States,* 468 F.2d 688, petition for a writ of certiorari pending, No. 72-5278.

Thus since all of the policy reasons which prompted the grant of certiorari in *Chavez,* supra, and *Giordano* supra, are applicable to this case as well, we respectfully request that certiorari be granted here, or in the alternative, that disposition of this petition be held in abeyance until *Chavez* and *Giordano* have been decided on their merits.

CONCLUSION

It is respectfully submitted that certiorari should be granted as to the first point raised in this petition because a grant in this case would result in a determination of the sufficiency of proof of proper authoriza-

tion. This important question does not arise in *Chavez* or *Giordano* and a final determination of that question is of great practical importance.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-2097

UNITED STATES OF AMERICA

v.

DOLORES IANNELLI, *Appellant*

(D.C. Crim. No. 71-62)

Appeal from the United States District Court for the Western District of Pennsylvania

Submitted Under Third Circuit Rule 12(6) June 11, 1973
Before GIBBONS and ROSENN, Circuit Judges

Appellant was indicted with several others for violation of 18 U.S.C. § 1955. At trial the jury could not agree on a verdict in her case and a mistrial was declared. At a new trial she was convicted. The first six points raised on appeal are identical with those raised in *United States* v. *Iannelli*, Nos. 72-1696-1703 (3d Cir. May 4, 1973) and are controlled by that decision. An additional ground is that the district court admitted in evidence duplicates of tape recording of telephone conversation without a proper foundation establishing their authenticity. The ruling, in the context of this record, was within the court's discretion. There was no abuse of discretion.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By the Court,
/s/ JOHN J. GIBBONS
Circuit Judge

Attest
/s/ THOMAS F. QUINN
Thomas F. Quinn
Clerk

Dated: June 12, 1973

APPENDIX B

Statutes Involved

18 U.S.C. 2516 provide, in pertinent part:

> (1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications * * *.

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
>
> * * * * * * * *
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> * * * * * * * *
>
> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
>
> * * * * * * * *
>
> (10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivi-

sion thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * * * * * *

18 U.S.C. provides, in pertinent part:

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-103

DOLORES IANNELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Western District of Pennsylvania petitioner was convicted of conducting an illegal gambling business in violation of 18 U.S.C. 1955. She was sentenced to six months' imprisonment, which sentence was suspended and she was fined $5,000.[1] The court of appeals affirmed (Pet. App. A). Petitioner challenges the validity of a court ordered electronic surveillance on the ground that proper procedures were not followed within the

[1] Petitioner had previously been tried with several codefendants for the same offense and for conspiracy to commit that offense. Four of her codefendants were acquitted, the remainder were convicted and the jury was unable to reach a verdict as to petitioner. Retrial and conviction in the instant case followed. The codefendants have petitioned this Court for a writ of certiorari to review their separate convictions, see *Robert E. Iannelli* v. *United States*, No. 73-64.

Department of Justice for authorizing the application to the court for the surveillance order. As petitioner points out (Pet. 4) this case presents the same issue before this Court in *United States* v. *Chavez*, No. 72-1319, certiorari granted, May 21, 1973.[2]

Since this issue is now pending in *Chavez* the Court may wish to defer disposition of the instant case pending resolution of the issue in *Chavez*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[2] Contrary to petitioner's claim, the district court specifically found that former Attorney General Mitchell had personally approved the surveillance application in this case. See Pet. App. 3a-4a in *Robert E. Iannelli*, No. 73-64, *supra*.